IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MEMORIAL HERMANN HEALTHCARE SYSTEM AND MEMORIAL HERMANN HOSPITAL SYSTEM	§	
Plaintiffs,	§	C.A. NO. 4:07-CV-01914
v.	§	JURY TRIAL DEMANDED
STEALTH, L.P., D/B/A HOUSTON TOWN & COUNTRY HOSPITAL AND WEST HOUSTON GP L.P.,	§	
Defendants.	§	

DEFENDANT STEALTH, L.P. d/b/a
HOUSTON TOWN & COUNTRY HOSPITAL'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
AND, ALTERNATIVELY, MOTION TO DISMISS OR STAY

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DEFENDANT STEALTH, L.P. d/b/a
HOUSTON TOWN & COUNTRY HOSPITAL'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
AND, ALTERNATIVELY, MOTION TO DISMISS OR STAY

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Stealth, L.P. d/b/a Houston Town & Country Hospital ("HTCH") moves to dismiss the complaint of Plaintiffs Memorial Hermann Healthcare System ("MH Healthcare") and Memorial Hermann Hospital System ("MH Hospital") (collectively "Memorial Hermann") for lack of subject matter jurisdiction and, alternatively, moves to dismiss or stay this action.

BACKGROUND

Town & Country Hospital was a physician-owned hospital located in West Houston at the intersection of Interstate 10 and Beltway 8. Town & Country Hospital went out of business because Memorial Hermann forced most of the major health insurers to join an illegal boycott to exclude Town & Country Hospital from their health insurance plans. Without these insurance contracts, Town & Country Hospital could not—and did not—survive.

The concept for Town & Country Hospital originated in late 2002. A number of physicians in West Houston wished to create a medical center where they could exercise greater influence over patient care. This desire arose from the physicians' intense dissatisfaction with Memorial Hermann's facility in West Houston—Memorial City Hospital—and the manner in which Memorial Hermann administered that facility. In addition, the physicians observed a substantial need for additional hospital beds and services in the West Houston community where the population was growing.

In May 2003, the physicians formed a hospital partnership and development began. That partnership was HTCH, which was comprised of 109 doctors, as well as some other investors who were not doctors. The general partner of HTCH was and continues to be West Houston, GP, L.P. ("West Houston").

In November 2005, Town & Country Hospital opened for operations. The newly-constructed hospital was a four-story, 120,000 square foot, state-of-the-art, general, acute-care hospital.

Well in advance of its opening, Town & Country Hospital contacted various health insurers to begin the process of negotiating contracts. It is vitally important for a hospital to have contracts with health insurers because these contracts allow insured patients to receive treatment at the hospital. For months, Town & Country Hospital met and spoke with representatives from many insurers. During these discussions, the insurers never indicated that they would not contract with Town & Country Hospital. To the contrary, the insurers reacted positively and acknowledged both a need for the facility as well as a desire to have competition in the community.

The emergence of Town & Country Hospital as a competitive threat to Memorial Hermann's Memorial City Hospital did not go unnoticed. Memorial Hermann set out to destroy Town & Country Hospital through unlawful means.

Memorial Hermann decided the best way to eliminate Town & Country Hospital was to convince the major health insurers in the Houston area to deny "preferred provider" status to Town & Country Hospital by organizing a group boycott. Using its market clout as an inducement to join the boycott, Memorial Hermann threatened the health insurers with severe economic consequences if they contracted with Town & Country Hospital. As the threats were being delivered, Memorial Hermann also coordinated the conduct of the entire group of health insurers by letting each insurer know that the other insurers were being similarly threatened, which insurers were agreeing to boycott Town & Country Hospital, and which insurers would be financially punished for refusing to join the boycott.

Memorial Hermann's boycott was successful, and Town & Country Hospital went out of business within months of its opening, thereby depriving patients in West Houston of quality health care options that were truly needed.

In April 2006, HTCH complained to the Texas Attorney General's office that MH Hospital had violated Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"). In response, the Texas Attorney General's office began an investigation of Memorial Hermann that continues to this day.

The demise of Town & Country Hospital sparked state-court litigation. In December 2006, six doctors who practiced together and who had invested in HTCH as limited partners, and their office manager (collectively the "Seven Limited Partners"), sued twelve entities and individuals who they believed were responsible for the downfall of Town & Country Hospital. Among others, the defendants included HTCH, West Houston, and the developer/landlord of the hospital. Multiple cross-claims were also filed. This state-court action is still pending and is styled *Franco, et al. v. West Houston GP, L.P. et al.*, No 2006-79945, in the 61st District Court of Harris County, Texas (the "State-Court Action").

After it became apparent through discovery that Memorial Hermann had intentionally sabotaged Town & Country Hospital, the Seven Limited Partners amended their petition in the State-Court Action on June 1, 2007 and joined MH Healthcare and MH Hospital as additional defendants. The amended petition asserted only state-law claims against Memorial Hermann, including allegations that Memorial Hermann had violated the TFEAA by organizing and enforcing the health insurers' boycott of Town & Country Hospital.

A week later, on June 8, 2007, just four days after it was served with the Seven Limited Partners' amended petition in the State-Court Action, Memorial Hermann raced to federal court and filed this action against HTCH and West Houston seeking a judicial declaration that its conduct complied with the TFEAA and the Sherman Act. Remarkably, Memorial Hermann's declaratory-judgment action does not seek the same declaration against the Seven Limited Partners who had just sued Memorial Hermann in the State-Court Action a week earlier, nor does it mention that it had already been sued in the preexisting State-Court Action.

On June 18, 2007, HTCH filed a cross claim against Memorial Hermann in the State-Court Action. HTCH's cross claim asserts only state-law claims, including allegations that Memorial Hermann violated the TFEAA by organizing and enforcing the health insurers' boycott of Town & Country Hospital, the same claim previously asserted by the Seven Limited Partners. No federal antitrust claims have ever been—or ever will be—asserted against Memorial Hermann by HTCH or West Houston concerning Town & Country Hospital.

ARGUMENTS & AUTHORITIES

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE ANY CASE OR CONTROVERSY REGARDING THE FEDERAL ANTITRUST LAWS IS MOOT.

Memorial Hermann seeks a judicial declaration that their conduct did not violate any federal antitrust laws. Compl. ¶ 22-23, 25. Memorial Hermann asserts that an actual controversy exists because "[t]he threat of litigation by [Town & Country Hospital] is real and substantial, and it is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Compl. ¶ 7. Even if Memorial Hermann possessed a reasonable fear of future litigation regarding federal antitrust laws at the time they filed their Complaint, the fact that HTCH and West Houston have, by the filing of this motion, disavowed any intention of pursuing federal antitrust claims moots Memorial Hermann's fear, erases any controversy regarding the federal antitrust laws, and eliminates the sole basis for federal-question subject matter jurisdiction.

Article III of the United States Constitution limits the judicial power of federal courts to the adjudication of "Cases" or "Controversies." U.S. CONST. art. III, § 2. The Declaratory Judgment Act similarly restricts federal courts' power to cases involving "actual controversy." 28 U.S.C. § 2201(a). The "controversy" requirements of Article III and the Declaratory Judgment Act are identical. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (The Declaratory Judgment Act extends "to controversies which are such in the constitutional sense.").

For a "controversy" to exist, a dispute must be "real and substantial," "definite and concrete, touching the legal relations of parties having adverse legal interests," and "admi[t] of specific relief through a decree of a conclusive character." *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (quoting *Aetna Life Ins.*, 300 U.S. at 240-241)). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

"This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). In other words, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). In the trial court, a party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy. *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993).

A "controversy" must be distinguished from a dispute that is moot. *Aetna Life Ins.*, 300 U.S. at 240. "Mootness is implicated when a case or controversy, originally present, ceases to exist." *Smallwood v. Scibana*, No. 06-6249, 2007 WL 1054713, at * 1 (10th Cir. Apr. 10, 2007) (unpublished). "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). Although subject matter jurisdiction generally does not vanish once it properly attaches, mootness is the most notable exception to the general rule. *Smallwood*, 2007 WL 1054713, at *1. The jurisdiction of a federal court evaporates when subsequent events terminate the controversy extant at the inception.

For example, an event that frequently moots declaratory judgment claims is a stipulation by the declaratory-judgment defendant that it has no intent to pursue the federal claims the declaratory-judgment plaintiff fears. *See, e.g.*, *Super Sack Mfg. Co. v. Chase Packaging Corp.*, 57 F.3d 1054, 1058-59 (Fed. Cir. 1995) (holding that declaration of intent not to sue rendered declaratory judgment claim moot because the declaration would be given estoppel effect); *Salvation Army v. Dep't of Comm. Affairs of New Jersey*, 919 F.2d 183, 192 (3d Cir. 1990) (finding declaratory judgment claim moot, in part, because of "an express assurance that there will be no enforcement against [plaintiff] of the waived provisions of the statute"); *Tesco Corp. v. Varco I/P, Inc.*, No. CIVA H-05-2118, 2006 WL 2022912, at *1 (S.D. Tex. July 17, 2006) (covenant not to sue mooted declaratory judgment claim); *Paramount Pictures Corp. v. Replay TV*, 298 F. Supp.2d 921, 926-27 (C.D. Cal. 2004) (unilateral covenant not to sue mooted declaratory judgment claim); *Dana Corp. v. Colfax Corp.*, No. 03 Civ. 7288(DC), 2004 WL 503742, at *4 (S.D.N.Y. Mar. 12, 2004) (declaratory judgment claim mooted where defendant "expressly disavowed any intention of bringing an action" asserting a federal claim); *Vesture Corp v. Verbal Solutions, Inc.*, 284 F. Supp.2d 290, 295 (M.D.N.C. 2003) (declaratory judgment claim was moot where "Defendants in this case have unconditionally promised not to sue for infringement"); *Newman-Green, Inc. v. Aptargroup, Inc.*, No. 97 C 3489, 1998 WL 178584, at *2 (N.D. Ill. Feb. 5, 1998) (unconditional promise not to sue mooted declaratory judgment claim); *Zip Dee, Inc. v. Dometic Corp.*, No. 93 C 3200, 1994 WL 8234, at *1 (N.D. Ill. Jan. 7, 1994) (stipulation not to sue mooted declaratory judgment claim).

Indeed, in a recent case involving none other than MH Hospital, *Halliburton Co. Benefits Comm. v. Memorial Hermann Hosp. Sys.*, No. Civ.A. H-04-1848, 2006 WL 148901 (S.D. Tex. Jan. 19, 2006), Judge Rosenthal recognized that a declaratory-judgment defendant could moot a potential federal question and negate subject matter jurisdiction by swearing not to pursue any federal claims:

> One avenue to avoid . . . [subject matter jurisdiction over a declaratory judgment action] is provided by judicial estoppel to enforce the declaratory judgment defendant's promise not to assert a[] [federal] claim, but only pursue state-law claims.
>
> * * *
>
> Judicial estoppel was not available in *Household Bank* or in *Kidder, Peabody* because although the declaratory judgment defendants committed not to assert their federal claims, they did not do so in a binding, judicially enforceable fashion. . . . Similarly, in the present case, Memorial Hermann did not make a sworn statement that it would not assert a [federal] claim as an assignee.

Id. at *4.

HTCH and West Houston, for themselves, their successors, and assigns, hereby covenant, stipulate, and agree that they have not asserted and do not intend to assert against MH Healthcare or MH Hospital any claims for violations of any federal antitrust laws, including, but not limited to, the Sherman Act or the Clayton Act, that arise from or relate to the acts or omissions referenced in either this declaratory-judgment action or in the State-Court Action. This representation has been verified under oath by officers of

HTCH and West Houston who are duly authorized to make this representation. *See* Attached Verifications.

In addition to this stipulation, two other facts should give the Court comfort that HTCH will not assert federal antitrust claims against Memorial Hermann in the State-Court Action if the Court dismisses this declaratory-judgment action. First, HTCH's cross claim against Memorial Hermann in the State-Court Action repeatedly and expressly disavows assertion of any federal claims. *See* Ex. A ¶¶ 103, 109, 117, 124. Second, the cross claim cannot be amended to assert any federal antitrust claims because "federal antitrust claims are within the exclusive jurisdiction of the federal courts . . . ." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

The stipulation disavowing any intent to pursue federal antitrust claims against Memorial Hermann moots any controversy regarding such claims and divests this court of subject matter jurisdiction over Memorial Hermann's declaratory judgment claim regarding the federal antitrust laws. Consequently, dismissal of that claim is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Super Sack Mfg.*, 57 F.3d at 1056, 1060 (affirming dismissal under Rule 12(b)(1) when case became moot due to a stipulation not to sue); *see also Thomas v. Barnhart*, No. 05-30549, 2005 WL 3369888, at *1 (5th Cir. Dec. 12, 2005) (affirming dismissal under Rule 12(b)(1) when case became moot).

Because the only federal claims in this action are now moot and must be dismissed for lack of subject matter jurisdiction, dismissal of Memorial Hermann's declaratory-relief claims regarding state-law issues, including the requested declaration regarding the

TFEAA, is required, whether or not the Court retains jurisdiction over them. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (when the single federal-law claim is eliminated at an "early stage" of the litigation, the district court has "a powerful reason to choose not to continue to exercise jurisdiction" over pendent state-law claims); *Scarfo v. Ginsberg*, 175 F.3d 957, 962 (11th Cir. 1999) ("The federal courts of appeals... have uniformly held that once the district court determines that subject matter jurisdiction over a plaintiff's federal claims does not exist, courts must dismiss a plaintiff's state law claims."); *Parker v. Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."); *Womble v. Bhangu*, 864 F.2d 1212, 1213-14 (5th Cir. 1989) (holding that dismissal of federal claims for lack of subject matter jurisdiction requires dismissal of pendent state-law).

II. ALTERNATIVELY, THIS COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS OR STAY THIS DECLARATORY-JUDGMENT ACTION.

In the event the Court determines that it has subject matter jurisdiction over this declaratory-judgment action, it should nevertheless decline to exercise that jurisdiction and dismiss or stay the action. Considerations of federalism, fairness, efficiency, and wise judicial administration strongly suggest that since the only remaining issues in this action are state-law issues that are already pending in the State-Court Action—where all other issues related to the collapse of Town & Country Hospital are being litigated—this action should be dismissed or stayed.

Federal district courts have "unique and substantial discretion" in determining whether to decide or dismiss declaratory-judgment actions. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The United States Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling act, which confers discretion on the courts rather than an absolute right on a litigant.'" *Wilton*, 515 U.S. at 287 (quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952)). In fact, the Declaratory Judgment Act includes on its face a "textual commitment to discretion," providing that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." *Wilton*, 515 U.S. at 286 (emphasis in original). The Act thus "created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Wilton*, 515 U.S. at 288. Accordingly, "[c]onsistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or dismiss an action seeking a declaratory judgment." *Wilton*, 515 U.S. at 288.

In *Wilton*, an insurer filed a declaratory-judgment action in the Southern District of Texas seeking a declaration of non-liability under an insurance policy. *See Wilton*, 515 U.S. at 279-80. The insured subsequently filed suit against the insurer in Texas state court. *See id.* at 280. In granting the insured's motion to dismiss or stay the insurer's declaratory-judgment action, the federal district court noted that the state lawsuit "encompassed the same coverage issues raised in the declaratory-judgment action and determined that a stay was warranted in order to avoid piecemeal litigation and to bar [the insurer's] attempts at forum shopping." *See id.* at 280. The Fifth Circuit reviewed the district court's decision for abuse of discretion and affirmed, "[c]iting the interests in avoiding duplicative proceedings and forum shopping" and noting that "[a] district court has broad discretion to grant (or decline to grant) declaratory judgment." *Id.* at 281 (internal citations omitted).

The Supreme Court granted certiorari and affirmed, recognizing that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Id.* at 282. In finding that the district court did not abuse its discretion in staying the declaratory-judgment action, the Supreme Court in *Wilton* noted that "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288.

While the Supreme Court has not set out an exclusive list of factors for a district court to consider in determining whether to exercise its discretion to dismiss or stay a declaratory-judgment action, it has provided some guidance.[1] *See Wilton*, 515 U.S. at 282-83. A district court should consider: the scope of the pending state court proceeding and the nature of defenses raised there; whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; whether necessary parties have been joined; whether such parties are amenable to process in that proceeding; and whether it would be "uneconomical" or "vexatious" to proceed where another suit was pending in

[1] "[W]here the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Wilton*, 515 U.S. at 288 n.2.

state court. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942); *see Wilton*, 515 U.S. at 283. Indeed, "at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in '[g]ratuitous interference' if it permitted the federal declaratory action to proceed." *See Wilton*, 515 U.S. at 283 (quoting *Brillhart*, 316 U.S. at 495).

The Fifth Circuit Court of Appeals has set forth the following nonexclusive factors for a district court to consider when determining whether to dismiss or decide a declaratory-judgment action:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> (2) whether federal questions are present in the declaratory-judgment action;
>
> (3) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
>
> (4) whether the plaintiff engaged in forum shopping in bringing the suit;
>
> (5) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> (6) whether the federal court is a convenient forum for the parties and witnesses;
>
> (7) whether retaining the lawsuit would serve the purposes of judicial economy; and
>
> (8) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 388-89, 394-97 (5th Cir. 2003). These factors address three broad considerations: federalism, fairness/improper forum shopping, and efficiency. *Sherwin-Williams Co.*, 343 F.3d at 390-91. Each factor will be discussed below.

A. There Is A Pending State Action In Which All Of The Matters In Controversy May Be Fully Litigated.

The State-Court Action is and has been pending since December 2006. All of the matters now in controversy in this declaratory-judgment action may be fully litigated in that case.[2] Indeed, the precise matters in controversy on which Memorial Hermann seeks a judicial declaration against HTCH are already pending in the State-Court Action by virtue of HTCH's cross claim against Memorial Hermann.[3] *See* Ex. A. West Houston is a party to the State-Court Action so the judicial declaration that Memorial Hermann seeks against it in this action may also be sought in the State-Court Action.

"[T]he presence or absence of a pending parallel state proceeding is an important factor" in deciding whether to dismiss or stay a federal declaratory-judgment action. *Sherwin-Williams*, 343 F.3d at 394. Because all of the matters in controversy in this action may be fully litigated in the pending State-Court Action, this important factor favors a dismissal or stay of this declaratory-judgment action.

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[2] As noted in Section I, no controversy now exists regarding Memorial Hermann's compliance with federal antitrust laws due to the filing of HTCH and West Houston's stipulation disavowing any intent to pursue federal antitrust claims.

[3] The matters in controversy on which Memorial Hermann seeks a judicial declaration include: whether their contracting practices with health insurers comply with the TFEAA, whether they may enter into exclusive or semi-exclusive contractual arrangements with health insurers, whether their manner of contracting with health insurers resulted in a horizontal group boycott or concerted refusal to deal, and whether their manner of contracting with health insurers resulted in a direct or indirect agreement between health insurers not to deal with HTCH. Compl. ¶ 25.

B. No Federal Questions Are Present In This Declaratory-Judgment Action.

The only federal questions raised in this action were whether Memorial Hermann's conduct complied with the federal antitrust laws. However, those federal issues have been mooted by HTCH and West Houston's stipulation disavowing any intent to pursue federal antitrust claims against Memorial Hermann. Thus, no federal questions are now present in this declaratory-judgment action.

The presence of federal law questions is "important to deciding whether a state or federal court should be the one to decide the issues raised in the federal court declaratory-judgment action." *Sherwin-Williams*, 343 F.3d at 390-91. When "the federal declaratory judgment action raises only issues of state law and a state case involving the same state law issues is pending, generally the state court should decide the case and the federal court should exercise its discretion to dismiss the federal suit." *Sherwin-Williams*, 343 F.3d at 390-91.

As discussed earlier, Judge Rosenthal, the author of *Sherwin-Williams* while sitting by designation on the Fifth Circuit Court of Appeals, recently applied this rule to the advantage of MH Hospital in *Halliburton Co. Benefits Comm. v. Memorial Hermann Hosp. Sys.*, No. Civ. A. H-04-1848, 2006 WL 148901 (S.D. Tex. Jan. 19, 2006). There, MH Hospital attempted to defeat federal-question jurisdiction in a declaratory-judgment action by disclaiming any intent to bring a federal claim, but failed because the disclaimer was not sworn. *See Memorial Hermann*, 2006 WL 148901, at *4. Finding that she had jurisdiction, Judge Rosenthal then turned to the discretionary question of whether she should exercise that jurisdiction. Even though no state-court action was pending, Judge Rosenthal declined to decide the declaratory-judgment action and dismissed it because MH Hospital had erased any federal questions from the declaratory-judgment action by disclaiming any intention to bring federal claims. *Id.* at **5-6.

Because HTCH and West Houston have stipulated not to sue Memorial Hermann for violations of the federal antitrust laws, this declaratory-judgment action now contains no federal questions and raises only state-law issues. The absence of federal questions in this declaratory-judgment action is an important factor that weighs in favor of dismissing or staying this case. *See id.*

C. Memorial Hermann Filed Suit In Anticipation Of A Lawsuit Filed By HTCH.

Memorial Hermann's Complaint concedes that they filed suit in anticipation of a lawsuit filed by HTCH:

> Stealth blames its demise on allegedly anticompetitive conduct by MHHS and is currently engaged in other litigation related to HTCH's failure. Stealth has served MHHS with discovery materials in the *Franco* lawsuit in a transparent effort to prepare for a federal or state antitrust claim against MHHS. The threat of litigation by HTCH is real and substantial, and it is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Compl. ¶ 24. Thus, this factor unequivocally weighs in favor of dismissing or staying this case.

D. Memorial Hermann Engaged In Forum Shopping By Bringing This Declaratory-Judgment Action.

Memorial Hermann has engaged in blatant forum shopping by bringing this declaratory-judgment action in federal court and omitting the Seven Limited Partners. The Seven Limited Partners sued Memorial Hermann for violations of the TFEAA on

June 1, 2007 in the State-Court Action. In response, Memorial Hermann raced to federal court one week later to seek a judicial declaration of non-liability under the TFEAA.

Realizing how obvious its forum shopping would be if it sued the Seven Limited Partners for a federal judicial declaration of non-liability under the TFEAA seven days after it had been sued in state court, Memorial Hermann attempted to disguise its procedural fencing by suing only the limited partnership of the Seven Limited Partners (HTCH) and the general partner (West Houston), while omitting any reference to the fact that the Seven Limited Partners had already sued Memorial Hermann the week before. Obviously, Memorial Hermann hopes to gain an advantage in the State-Court Action by obtaining in this Court a judicial declaration of non-liability under the TFEAA before the state-court can adjudicate the issue.

Memorial Hermann did not rush to federal court to sue HTCH and West Houston because it just realized it had a potential dispute with HTCH. To the contrary, by its own admission, Memorial Hermann has known about HTCH's complaints of anticompetitive conduct for more than a year. Compl. ¶ 18. Suffice it to say, it was not a coincidence that, within four days of being served with a state-court petition, Memorial Hermann decided that a federal court must resolve its fear of litigation by HTCH. The simple explanation for Memorial Hermann's rush to federal court is that it did not want its conduct judged in the State-Court Action, even though every one with complaints about Memorial Hermann were already parties to it.

To make matters worse, Memorial Hermann intentionally omitted the Seven Limited Partners from this federal declaratory-judgment action. Impermissible forum manipulation occurs when a federal declaratory-judgment plaintiff selectively sues only those whose presence will permit the action to be maintained in federal court, while excluding from the federal action parties to an existing, related state-court action whose presence would prevent the federal court from considering the merits of the declaratory-judgment action. *See Sherwin-Williams*, 343 F.3d at 397 n.7 ("Courts have also found impermissible forum manipulation if the declaratory judgment plaintiff sues only diverse defendants, but the underlying state court action is not removable because nondiverse defendants are properly sued.").

Memorial Hermann did not sue the Seven Limited Partners in this declaratory-judgment action—even though they were obvious targets for declaratory relief since they had already sued Memorial Hermann for violating the TFEAA—because doing so would have deprived this Court of the authority to consider the case. *See Sherwin-Williams*, 343 F.3d at 388 n.1 ("[A] district court does not have authority to consider the merits of a declaratory-judgment action when: (1) the declaratory defendant previously filed a cause of action in state court; (2) the state case involved the same issues as those in the federal court; and (3) the district court is prohibited from enjoining the state proceedings . . . .").

In other words, Memorial Hermann impermissibly attempted to manipulate the forum by selectively suing in federal court ***only*** those whose presence might permit the action to be maintained there (HTCH and West Houston), while excluding parties to a pending, related, state-court action (the Seven Limited Partners) whose presence would prevent the federal court from considering the merits of the declaratory-judgment action.

Memorial Hermann's forum shopping should not be countenanced. Accordingly, this factor weighs heavily in favor of dismissing or staying this case.

E. Possible Inequities Exist In Allowing Memorial Hermann To Change Forums.

In the State-Court Action, Memorial Hermann has answered and generally denied the claims by the Seven Limited Partners that Memorial Hermann violated the TFEAA. *See* Ex. B. Because Memorial Hermann did not remove those claims to federal court, those claims will be litigated in the State-Court Action. Nevertheless, Memorial Hermann asks this Court to adjudicate the same issues, only against HTCH and West Houston, in this separate declaratory-judgment action.

If both actions proceed simultaneously, the potential for inconsistent rulings by this Court and the state court is real. Thus, possible inequities exist in allowing Memorial Hermann to change forums. *See Hiscox Dedicated Corp. Member, Ltd. v. Carolina Consultants of Nevada, LLC.*, No. H-06-2497, 2006 WL 3053390, at *3 (S.D. Tex. Oct. 26, 2006) (allowing a declaratory plaintiff to change forum created possible inequities because inconsistent rulings by the federal and state courts could result); *Fireman's Fund Ins. Co. v. Hlavinka Equip. Co.*, No. Civ. A. H-05-2515, 2005 WL 2792383, at *3 (S.D. Tex. Oct. 26, 2005) (inequity in allowing declaratory action to proceed existed because there was a potential for inconsistent rulings by the federal and state courts). This factor further weighs in favor of dismissing or staying this declaratory-judgment action.

F. The Federal Court Is A Convenient Forum For The Parties And Witnesses.

HTCH and West Houston concede that 515 Rusk Street and 201 Caroline Street (the location of the Harris County Courthouse) are equally convenient forums for the parties and witnesses in this case. Thus, this factor does not weigh in favor of dismissing or staying this case.

G. Retaining This Declaratory-Judgment Action In Federal Court Would Not Serve The Purposes Of Judicial Economy.

The pending State-Court Action began in December 2006 when the Seven Limited Partners, Miguel Franco, Richard Pohil, Roger Schultz, Marsha Hughart, Craig Jefferies, John Levins, and Tim Thomas sued twelve individuals and entities, including West Houston GP, L.P., Stealth, L.P., West Houston Joint Ventures, Inc., West Houston GP Management, L.L.C., GP Medical Ventures, L.L.C., Thomas A. Gallagher, Thomas L. Pritchett, Teresa R. Danna, Mary Margaret Hamlett, MPT West Houston Hospital L.P., MPT West Houston MOB L.P., and Leaf on a Tree, L.P., alleging claims for breach of the HTCH partnership agreement, breach of fiduciary duty, constructive fraud, fraud, tortious interference, fraudulent transfers, unjust enrichment, breach of the West Houston partnership agreement, conspiracy, and declaratory judgment. *See* Ex. C at 21-30 ¶¶ 73-113. The Seven Limited Partners also sought access to HTCH's books, appointment of a receiver, and a temporary injunction. *See* Ex. C at 15-21 ¶¶ 44-72.

In response, HTCH cross claimed against MPT West Houston Hospital L.P., MPT West Houston MOB L.P., and Leaf on a Tree, L.P. alleging claims of breach of a transition agreement, fraud and misrepresentation, and conspiracy to defraud.[4] *See* Ex. D at 6-7 ¶¶ 22-28. Then WHGP Management, L.L.C. also cross-claimed against MPT

[4] Memorial Hermann is obligated to indemnify the MPT cross-defendants for certain breaches of the transition agreement. Thus, in addition to the Seven Limited Partners, HTCH, and West Houston, the MPT cross-defendants are also potential cross-claimants against Memorial Hermann in the State-Court Action.

West Houston Hospital L.P. and MPT West Houston MOB L.P., alleging a claim for breach of the transition agreement. *See* Ex. E at 4 ¶¶ 16-20.

Next, the Seven Limited Partners amended their petition and sued Memorial Hermann, alleging violations of the TFEAA, and tortious interference with the doctor patient relationship, existing business relations, and prospective business relations. *See* Ex. F at 30-31 ¶¶ 77-87.

Finally, HTCH cross claimed against Memorial Hermann, alleging violations of the TFEAA, conspiracy to violate the Texas Insurance Code, and tortious interference with prospective business relationships. *See* Ex. A at 25-29 ¶¶ 103-123.

In summary, the pending State-Court Action related to the failure of Town & Country Hospital contains nine plaintiffs/cross-plaintiffs, fourteen defendants/cross-defendants, and at least twenty-one causes of action. The State-Court Action will determine in one fell swoop who and what caused the collapse of Town & Country Hospital.

The existing parties to the State-Court Action have served and responded to interrogatories and requests for production, filed and responded to special exceptions, conducted non-party discovery, moved for protection, moved to compel production, entered into confidentiality agreements, moved for summary judgment, and participated in oral hearings. And depositions will begin soon. The trial judge in the State-Court Action has held hearings, made rulings, familiarized himself with the case, and scheduled trial for January 28, 2008.

"A federal district court should avoid duplicative or piecemeal litigation where possible." *Sherwin-Williams*, 343 F.3d at 391. "A federal court should be less inclined to hear a case if necessary parties are missing from the federal forum, because that leads to piecemeal litigation and duplication of effort in state and federal courts." *Id.* "Duplicative litigation may also raise federalism or comity concerns because of the potential for inconsistent state and federal court judgments, especially in cases involving state law issues." *Id.*

Retaining this case in federal court would foster both duplicative and piecemeal litigation. The duplicative litigation would consist of the claims related to Memorial Hermann's noncompliance with the TFEAA, which are pending in this action and the State-Court Action. The piecemeal litigation would result from the fact that the State-Court Action encompasses seven plaintiffs, twelve defendants, and twenty state-law causes of action not raised in this declaratory-judgment action, even though all arise from the collapse of Town & Country Hospital.

> Were this Court to resolve the declaratory action before it, these related claims would remain unresolved, and the parties would still be required to litigate the state action. On the contrary, all claims will be resolved in the state court proceeding. It would thus be inefficient and uneconomical for this action to proceed.

Great Lakes Reinsurance (UK) PLC v. Spielvogel, No. H-06-0982, 2006 WL 1663755, at *3 (S.D. Tex. June 13, 2006).

As explained above, retaining this declaratory-judgment action in federal court would not serve the purposes of judicial economy. For these reasons, this factor weighs strongly in favor of dismissing or staying this declaratory-judgment action.

H. This Court Is Not Being Asked To Construe A State Judicial Decree Involving The Same Parties And Entered By The Court Before Whom The Parallel State Suit Between The Same Parties Is Pending.

Because the Court has not been asked to construe a state judicial decree, this factor does not weigh in favor of dismissing or staying this case.

I. Conclusion

Considerations of federalism, fairness, and efficiency, and six of the eight discretionary factors identified in *Sherwin-Williams*, favor the dismissal or stay of Memorial Hermann's declaratory-judgment action. Practicality and wise judicial administration also warrant deciding all issues related to the demise of Town & Country Hospital in one proceeding, the State-Court Action. For these reasons, the Court should decline to decide this declaratory-judgment action.

PRAYER

For these reasons, HTCH requests that Memorial Hermann's Complaint be dismissed for lack of subject matter jurisdiction or, in the alternative, that it be dismissed or stayed for discretionary reasons. HTCH requests all other relief to which it is entitled.

Respectfully submitted,

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VERIFICATION OF
STEALTH, L.P. d/b/a HOUSTON TOWN & COUNTRY HOSPITAL

Stealth, L.P. d/b/a Houston Town & Country Hospital hereby verifies under penalty of perjury that it has personal knowledge of the following facts asserted in Defendant Stealth, L.P. d/b/a Houston Town & Country Hospital's Motion to Dismiss for Lack of Subject Matter Jurisdiction and, Alternatively, Motion to Dismiss or Stay, and that they are true and correct:

> HTCH and West Houston, for themselves, their successors, and assigns, hereby covenant, stipulate, and agree that they have not asserted and do not intend to assert against MH Healthcare or MH Hospital any claims for violations of any federal antitrust laws, including, but not limited to, the Sherman Act or the Clayton Act, that arise from or relate to the acts or omissions referenced in either this declaratory-judgment action or in the State-Court Action.

STEALTH, L.P., D/B/A HOUSTON TOWN & COUNTRY HOSPITAL

By: West Houston, GP, L.P.
Its: General Partner

By: West Houston Joint Ventures, Inc.
Its: General Partner

By: Thomas Pritchett
Name: Thomas Pritchett
Title: Secretary

Date: 7/2/07

SWORN TO AND SUBSCRIBED before me on this 2nd day of July, 2007.

Lynda L. Gonzalez
Notary Public in and for the
State of TEXAS

LYNDA L. GONZALEZ
Notary Public, State of Texas
Commission Expires 12-27-2009

VERIFICATION OF
WEST HOUSTON GP, L.P.

West Houston GP, L.P. hereby verifies under penalty of perjury that it has personal knowledge of the following facts asserted in Defendant Stealth, L.P. d/b/a Houston Town & Country Hospital's Motion to Dismiss for Lack of Subject Matter Jurisdiction and, Alternatively, Motion to Dismiss or Stay, and that they are true and correct:

> HTCH and West Houston, for themselves, their successors, and assigns, hereby covenant, stipulate, and agree that they have not asserted and do not intend to assert against MH Healthcare or MH Hospital any claims for violations of any federal antitrust laws, including, but not limited to, the Sherman Act or the Clayton Act, that arise from or relate to the acts or omissions referenced in either this declaratory-judgment action or in the State Court Action.

WEST HOUSTON GP, L.P.

By: West Houston Joint Ventures, Inc.
Its: General Partner

By: Thomas Pritchett
Name: Thomas Pritchett
Title: Secretary
Date: 7/2/07

SWORN TO AND SUBSCRIBED before me on this 2nd day of July, 2007.

Lynda L. Gonzalez
Notary Public in and for
the State of TEXAS

LYNDA L. GONZALEZ
Notary Public, State of Texas
Commission Expires 12-27-2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following counsel of record on this 2nd day of July, 2007, by certified mail, return receipt requested:

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